In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 678.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of Ohio.

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FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of Ohio.

THERE IS NO REASON TO GRANT THE WRIT OF CERTIORARI IN THE INSTANT CASE.

The instant petition for a writ of certiorari does not present a case where the Ohio Supreme Court has decided a federal question of substance not heretofore determined by this Court, or a case in which the Ohio Supreme Court has decided it in a way probably not in accord with applicable decisions of this Court.

> "Rule 5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
>
> (Rules, Supreme Court of the United States.)

The instant petition for certiorari raises exactly the same question which was before this Court in *C. & O. Ry. Co. v. Vigor*, 302 U. S. 705, 82 L. Ed. 545, 58 S. C. R. 25. In that case this Court denied a petition for certiorari to the U. S. Circuit Court of Appeals (6th Circuit), which Court in *C. & O. Ry. Co. v. Vigor*, 90 Fed. (2d) 7, held in the following pertinent syllabus that:

> "2. Railway company held not entitled to injunction against administratrix's prosecution of action against it for employee's death, in Federal Court for the district in which it is doing business, on the ground of inconvenience or extra expense in producing witnesses residing in another state, wherein deceased was injured and administratrix resided.
>
> "3. Railway company held not entitled to injunction against prosecution of suit against it, for employee's death, in Federal Court for district of another state than that in which plaintiff and defendant's witnesses resided and deceased was injured, on the ground that defense of such suit would place unreasonable burden on interstate commerce.
>
> "4. Congress, having power to regulate interstate commerce, may place incidental burdens thereon, by jurisdictional statutes, such as act authorizing filing of suit for damages, under the Federal Employers' Liability Act, in any district wherein defendant is doing business."

The briefs of both the petitioner and respondent in the *Vigor* case, *supra*, in this Court, indicate clearly that the question in that case was identical with the question raised by the instant petition.

> "The lower courts regarded the Federal Employers' Liability Act, permitting the filing of the respondent's action in Hammond, Indiana, as controlling, and treated the said act of Congress as one inhibiting such a case as the railway company instituted for an injunction." Petitioner's Brief, page 9, *C. & O. v. Vigor* (U. S. Supreme Court) *supra*.
>
> "The real question involved is whether or not the District Court of the United States for the Southern

District of Ohio (Sixth Circuit) may enjoin respondent from prosecuting a suit in the District Court of the United States for the Northern District of Indiana (Seventh Circuit) to recover damages for the death of her intestate under the provisions of the Federal Employers' Liability Act, it being admitted that deceased was engaged in interstate commerce at the time of his injury and that petitioner was doing business in the Northern District of Indiana at the time the suit was filed." Respondent's Brief, page 2, *C. & O. v. Vigor* (U. S. Supreme Court) *supra.*

The decision of the Ohio Supreme Court is in full accord with and follows the law, the logic and the decision of the *Vigor* case.

Nor is there any conflict in the decisions of Courts of last resort which have considered the question here raised. Every such Court of last resort has denied the contentions advanced here by the petitioner (*B. & O. R. R. Co. v. Kepner*, 137 Ohio St. 409; *McConnell v. Thomson*, 213 Indiana 16, 8 N. E. (2d) 986; *C. & O. Ry. Co. vs. Vigor, supra; C., M. & St. P. R. Co. v. Schendel*, 292 Fed. 326). Only one reported decision by any Court, high or low, anywhere sustains the petitioner's claims *B. & O. R. R. Co. v. Bole*, 31 Fed. Supp. 221. The opinion in the *Bole* case is by a District Court Judge upon a motion for a temporary injunction in an ex parte hearing where the employee was not represented. As obvious as the fact that such Court had before it only the railroad company contentions is the fact also that the Court was not fully and correctly apprized of the applicable law. *B. & O. v. Inloe* (Petitioner's Brief, page 34), by an inferior Ohio Court, was definitely discountenanced and overruled by the Ohio Supreme Court in *B. & O. v. Kepner, supra. C. & O. v. Bryant* (Petitioner's Brief, page 34) was by an inferior Virginia Court again apparently in an ex parte hearing in which the employee did not appear and was not represented. Patently no conflict warranting this Court's attention exists among the reported cases.

The instant petitioner does not rely upon any right, title, privilege or immunity under any statute of the United States or the Constitution of the United States. It does not claim to have been denied any such title, right, privilege or immunity. This Court has denied certiorari in the *Vigor* case, *supra*, where the identical question here involved was before this Court. The Ohio Supreme Court has not decided any federal question of substance not heretofore determined by this Court. The Ohio Supreme Court has not decided the instant case in a way probably not in accord with applicable decisions of this Court. The decision of the Ohio Supreme Court is in full accord and on all fours with the decision in the *Vigor* case. There is no conflict whatsoever of reported decisions of Courts of last resort. It is respectfully submitted that no reason warrants the granting by this Court of a review on writ of certiorari and that the instant petition accordingly should be denied.

SUMMARY OF ARGUMENT.

I. (A) The power of Congress over interstate commerce is supreme, plenary, exclusive, complete in itself, and not to be hampered by the action of the states or state courts: *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, *Second Employers' Liability Act* cases, 223 U. S. 58; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501; *Wilson v. New*, 243 U. S. 332; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

(B) Laws of the United States made in pursuance of federal constitution are supreme law of the land binding judges in every state. *Robb v. Connolly*, 111 U. S. 637; Article VI, Clause 2—Constitution of the United States.

II. (A) Respondent's conceded right to sue in District Court for the Eastern District of New York pursuant to 45 U. S. C. 56 is substantive, can not be abridged, and entitles respondent to whatever remedial advantage inheres in the forum chosen.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U. S. C., Sec. 56.

Petitioner's Brief, page 43, conceding jurisdiction; *Missouri, etc. v. Taylor*, 266 U. S. 200, 209.

(B) District Court duty to assume jurisdiction pursuant to 45 U. S. C. 56, referred to also as Section 6, is mandatory. *Second Employers' Liability Act* cases, *supra*; *Schendel v. McGhee, District Judge*, 300 Fed. 273; *So. Railway v. Cochran*, 56 Fed. (2d) 1019.

(C) Historical background shows a clear congressional intent in Section 6 to allow employee to exercise choice of federal court there indicated.

(1) Historical tendency to liberalize act in favor of the employee.

(a) Abolition of fellow-servant rule, making contributory negligence a *pro tanto* defense, creating absolute liability in Safety Appliance Act cases, abolishing defense of assumption of risk; extending statute of limitations.

(2) Congressional Committee reports on amendment which became 45 U. S. C. 56 in 1910.

(a) "It seems clear from these decisions that a suit in a federal court under this law (prior to enactment of Section 6), where jurisdiction is founded on the fact that the case involves a federal statute, must be brought in the district of which the defendant is an inhabitant." • • • "No argument is necessary to convince that this is a grave injustice to the plaintiff. Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a federal court on a right based on the law of the United States." Report 432, Mr. Borah reporting from the Committee on the Judiciary of the Senate, and Report 513, Mr. Sterling from the Committee on the Judiciary of the House, 61st Congress, Second

Session—to accompany H. R. 17263; *Trapp vs. B. & O. R. R. Co.*, 283 Fed. 655.

(D) Respondent's right to recover under the Federal Employers' Liability Act can not be destroyed or frustrated by state action. *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 509; *C. M. & St. P. R. R. Co. v. Schendel*, 292 Fed. 326; *Atcheson, T. & S. F. Ry. Co. vs. Sowers*, 213 U. S. 55; *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

(E) Valid Congressional exercise of constitutional power may properly result in incidental burdens on interstate commerce and cause inconvenience, hardship and extra expense. *So. Railway v. Cochran, supra; Hoffman v. State of Missouri*, 274 U. S. 21; *D. & R. G. R. Co. v. Terte*, 284 U. S. 284; *C. & O. v. Vigor*, 302 U. S. 705; *Connelly v. C. R. R. Co. of N. J.*, 238 Fed. 932; *Trapp v. B. & O., supra; C. M. & St. P. R. Co. v. Schendel, supra.*

III. Discussion of authorities cited by petitioner.

(A) The only reported decision cited by petitioner which is in point is by an inferior District Court on a motion for a temporary injunction rendered after an ex parte hearing where employee was not represented. *B. & O. R. R. Co. v. Bole*, 31 Fed. Supp. 221.

(B) Other cases where injunctive relief was granted are either:

(1) Cases where suit of employee was filed in state court.

(a) Indiana cases differentiated by Indiana Supreme Court in *McConnell vs. Thomson, supra.*

(2) Cases other than Federal Employers' Liability Act cases.

(a) *Davis v. Farmers' Cooperative Co.*, 262 U. S. 312, differentiated in *State of Missouri v. Taylor, supra; Hoffman v. State of Missouri, supra; D. & R. G. R. Co. v. Terte, supra; International Milling Co. v. The Columbia Trans. Co.*, 292 U. S. 511.

(C) Other cases not in point.

(1) *Douglas v. N. Y., N. H. & H. R. Co.*, 279 U. S. 377 in which suit of employee was brought in a state court. This Court held Federal Employers' Liability Act did not purport to compel a state court to assume jurisdiction as against an otherwise valid excuse. But this Court has held consistently, *supra*, that the jurisdiction of federal district court thereunder is mandatory.

(2) Cases which concern matters with reference to which Congress has not acted. But Congress having acted in Section 6 preempts that field and such act "insofar as it deals with the subjects to which it relates, is supreme and exclusive." (*S. A. L. Ry. Co. v. Kenney*, 240 U. S. 489, one of the cases in this group cited by petitioner.)

(3) *Bryant v. A. C. L. R. Co.*, 92 F. (2d) 569 concerned right of federal court to enjoin a state court which was not disturbing the federal court's jurisdiction, federal court action based on statute prohibiting injunction to stay proceedings in any state court.

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Sec. 379, Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265.

(4) *Steelman v. All Continent Corp.*, 301 U. S. 278. Injunction allowed by federal court where its jurisdiction under bankruptcy act was likely to be thwarted by filing of other suit. This case, in fact, would seem to support the view that the jurisdiction of the federal court for the Eastern District of New York should likewise be protected from a state court of equity which by injunction, to all intents and purposes, would impair jurisdiction of federal court and nullify Section 6.

IV. Other claims of petitioner are erroneous.

(A) Petitioner's claim that the district in which the defendant is doing business does not mean any district is

frivolous and inane. Historical background, plain meaning of language and authorities indicate clearly a right to institute suit in any district in which the defendant is doing business. *C. & O. v. Vigor, supra; C. M. & St. P. R. R. Co. v. Schendel, supra; Moore v. C. & O. Ry. Co.*, 291 U. S. 205.

(B) View of the petitioner that Article IV, Section 2 of the Constitution of the United States may be said to be violated where state enjoins suit by its own citizen in another state is bottomed on failure to understand that said Article IV, Section 2 does not govern the relationship between a state and its own citizens and requires only that a state not discriminate as against citizens of another state. *Slaughter House Cases*, 16 Wall. 77; *Cole v. Cunningham*, 133 U. S. 107.

CONCLUSION.

To grant petitioner's claims would be to destroy the Federal Employers' Liability Act, create a chaotic condition which would pervert and mutilate Section 6, and compel employee either to sue in that district which best suits the convenience of the carrier, or suffer the delay and expense of two law suits, the first to determine whether he may sue in that district in which the Congress has vested in him a federal substantive right to sue.

No reason exists for reviewing this case. The decisions of the courts are not in conflict; this Court has already denied certiorari in a case with the decision of which the Ohio Supreme Court in the instant case is in full accord. *C. & O. v. Vigor*, 302 U. S. 705. The instant suit is one brought only to delay the trial of the respondent's action on its merits. This delay should be ended. The petition for certiorari should be denied.

ARGUMENT.

I.

Article I, Section 8 of the Constitution of the United States vests in the Congress of the United States a power over interstate commerce which is supreme, exclusive, plenary, complete in itself and not dependent on and not to be hampered by the action of the states. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; *Savage v. Jones*, 225 U. S. 501, 533, 56 L. Ed. 1182, 1195, 32 Sup. Ct. Rept. 715, 726; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501, 34 Sup. Ct., 635, 638 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475); *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 41, 36 Sup. Ct. 483, 60 L. Ed. 874; *Second Employers' Liability Act Cases*, 223 U. S. 58, 32 Sup. Ct., 169, 178, 56 L. Ed. 327; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893.

In *Robb v. Connolly*, 111 U. S. 637, Justice Harlan said:

> "Upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, wherever those rights are involved in any suit or proceeding before them, for the judges of the state courts are required to take an oath to support that Constitution and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding' (Article VI, Clause 2 of the Constitution of the United States)."

II.

The Federal Employers' Liability Act, as amended, Section 6 (45 U. S. C., Sec. 56) vests in the respondent a clear, concise, definite, substantive federal right to institute his action in the U. S. District Court for the Eastern Dis-

trict of New York. On page 43 of its Brief, the petitioner says:

> "No attack was made below on the jurisdiction of the District Court in the Eastern District of New York, nor on its process, nor is any made now."

The right of the respondent to determine the jurisdiction in which to file his cause of action, pursuant to Section 6 of the Federal Employers' Liability Act, is a substantive right that cannot be abridged. See *Missouri, etc. v. Taylor*, 266 U. S. 200, 209, 45 S. Ct. Repr. 47, 69 L. Ed. 247, where this Court said:

> "The grant of concurrent jurisdiction implies that in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961."

Assuming jurisdiction to exist, there is a mandatory duty upon the District Court to take that jurisdiction and try the case. The Court cannot be concerned with the justice or the wisdom of Section 6. *Second Employers' Liability Act* cases, 223 U. S. 58, 32 Sup. Ct., 169, 178, 56 L. Ed. 327; *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755; *Schenael v. McGhee, District Judge*, 300 Fed. 273; *Norris v. Ill. Central*, 18 Fed. (2d) 584; *Trapp v. B. & O.*, 283 Fed. 655; *Connelly v. Central R. Co. of New Jersey*, 238 Fed. 932; *So. Railway v. Cochran*, 56 Fed. (2d) 1019; *Wood v. D. & H. Ry. Co.*, 63 Fed. (2d) 235; *C. & O. v. Vigor*, 90 Fed. (2d) 7; *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

The Federal Employers' Liability Act shows a constant Congressional intention to enlarge the rights of the employee, to liberalize the Act in his favor and to render ever easier and more certain his right and ability to recover for injury sustained during the course of his employment. The Congress abolished the fellow-servant rule and made contributory negligence only a *pro tanto* defense. The

Congress later rendered unavailable to carriers, the defenses of assumption of risk and contributory negligence in cases covered by the Federal Safety Appliance Acts. An absolute liability was thus imposed on the carrier where the violation of such statutes contributed directly to the injuries. In 1939 the Act was again amended to take away from the carrier the defense of assumption of risk in every case in which the injury or death of the employee resulted in whole or in part from the negligence of any of the officers, agents, or employees of the carrier. The statute of limitations has been enlarged from one year to two years and now by amendment in 1939 to three years.

Section 6 came into being by amendment in 1910. Theretofore an action under the Federal Employers' Liability Act, like any other action arising under a law of the United States, if commenced in a Federal Court, had to be brought in the district of which the defendant was an inhabitant, which in the case of a corporation was the jurisdiction in which the charter of the defendant corporation was issued. Section 51, Judicial Code. This was true even if diversity of citizenship existed. (*Macon Grocery Co. v. A. C. L. R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; *Shaw v. Quincy Mining, etc.*, 145 U. S. 445, 12 Sup. Ct. 935, 36 L. Ed. 768; *Galveston, etc. v. Gonsalez*, 151 U. S. 496, 14 Sup. Ct. 491, 38 L. Ed. 248; *So. Pac. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.) The purpose of the 1910 amendment, the Court points out, in *Trapp v. B. & O. R. R. Co., supra*, is clearly set forth in the Senate Judiciary Committee's Report recommending its enactment. It was to enlarge the provisions of Section 51, Judicial Code, so as to permit the suit to be brought in any one of the places provided by the Amendment instead of in the single district of which the employer was an inhabitant.

The Ohio Supreme Court, therefore, was eminently correct in stating that:

> "It is obvious that when Congress amended the act in 1910 and thereby provided that an employee plaintiff

might bring his action in the district of the residence of a defendant, or in which the cause of action arose, or in which a defendant was doing business at the time of commencing such action, it gave him, and intended to give him, his free choice to bring his action in any one of the three possible locations mentioned in the statute, and gave him this right with full knowledge that it would permit him, under the permissive circumstances named in the statute, to bring his action in courts far distant from the place where his cause of action arose." *B. & O. R. R. Co. v. Kepner, supra*, R. p. 79.

This Court in *Missouri, etc. v. Taylor, supra*, pointed out that the person endowed with a choice of jurisdiction is entitled "to whatever remedial advantage inheres in the particular forum" he chooses. If a state court may enjoin the exercise by a citizen of the United States of such a definite, clear, concise, and substantive federal right as is vested in respondent by Section 6, and nullify the privilege which Congress intended to vest in such citizen, it would be

"taking a privilege from one upon whom it is conferred by statute, and giving it to the opposite party against whom that specific privilege was granted." *C. & O. v. Vigor*, 17 Fed. Supp. 602.

This Court in *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 509, 36 Sup. Ct. 683, 689 (60 L. Ed. 1125) said, apropos the employer's effort to invoke certain sections of the Idaho Code adverse to the employee's rights, that:

"Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield."

In *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326, the first paragraph of the syllabus reads:

"Under the Employers' Liability Act, Section 6, the * * * jurisdiction thus conferred on the Courts of the

United States cannot be interfered with by a state, either through its Legislature or Courts, and a state statute which prohibits a citizen of a state from bringing an action under the Act in a Federal Court of a district in which the defendant is doing business, is unconstitutional."

This Court in *Savage v. Jones, supra,* said:

"When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

See also *L. & N. R. Co. v. Hughes,* 201 Fed. 727, 744, where the Court says:

"The rule may be deduced from all of the cases, that a state act necessarily by its requirements bringing about a conflict with the requirements of an act of Congress on the same subject produces that direct interference with interstate commerce which is not permissible."

In *Missouri, etc. v. Taylor, supra,* this Court said:

"No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right. *Central Vermont Ry. Co. v. White,* 238 U. S. 507, 511, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Atlantic Coast Line R. R. v. Burnette,* 239 U. S. 199, 36 S. Ct. 75, 60 L. Ed. 226; *New Orleans & Northeastern R. R. Co. v. Harris,* 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *Yazoo & Mississippi Valley R. R. Co. v. Mullins,* 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754."

Chief Justice Marshall in *Gibbons v. Ogden, supra,* phrased the law pertinent hereto as follows:

"Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

In *McConnell v. Thomson, supra*, the Supreme Court of Indiana held in the following pertinent syllabus that:

"1. A state court's equity powers are ineffectual against valid exercise of legislative power by United States Congress."

"2. A state court cannot limit United States citizen's exercise of right conferred by valid act of Congress, since state itself in exercise of full sovereign power cannot limit or abridge such right."

"3. An Indiana equity court had no power to enjoin Indiana citizen from prosecuting action in Federal Court of another state under Federal Employers' Liability Act, since such injunction would destroy federal right of litigant and obstruct federal court in performance of duty (Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 *et seq.*)."

The Supreme Court of Indiana reviews the law at considerable length and reaches the conclusion that:

"Congress can, and by the provisions of the Federal Employers' Liability Act, as construed and applied by the federal courts, has conferred upon any person asserting a cause of action under such act a federal right to bring the action in a District Court of the United States in the district in which the defendant may be doing business at the time of commencing such action; and has imposed upon such District Court the duty of accepting jurisdiction of such action. Consequently when a state court, as in the instant case, attempts to enjoin a litigant from prosecuting his cause of action, arising under the Federal Employers' Liability Act, in a District Court of the district in which the defend-

ant is doing business, such action, if effective, destroys a federal right of the litigant and obstructs the performance of a duty imposed by act of Congress upon a District Court of the United States. This is beyond the power of a state." (8 N. E. (2d) 986, 991.)

Were the legislature of the State of Ohio to declare a series of equity principles governing its Courts and legislate to the effect that no person resident in Ohio could bring suit for the recovery of personal injuries in any district other than in the State of Ohio, unquestionably such legislation insofar certainly as it conflicted with the Federal Employers' Liability Act would be unconstitutional. See *Atcheson, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695. *Certainly the equity powers of a state court can not rise above the rights of the State itself in the exercise of its full sovereign power. McConnell v. Thomson, supra.*

Claims of Incidental Burden on Interstate Commerce, Inconvenience, Hardship and Expense Are of No Avail to Petitioner.

Congress has the power to impose incidental burdens on interstate commerce in the creation of clear, unequivocal rights validly enacted. In *Southern Ry. v. Cochran, supra*, the Court says:

"It must be borne in mind that Congress has the power to regulate interstate commerce. The states have no such power. *If the effect of a federal statute conferring jurisdiction upon a federal court is to place a burden upon interstate commerce, the power for that purpose exists, and the remedy is legislative and not judicial.* (Italics ours.) The precise question here presented was considered by the Circuit Court of Appeals for the Eighth Circuit in *Schendel v. McGhee, District Judge*, 300 F. 273, 278. It was there said: 'We assume Congress could provide that actions in the federal courts should be brought at places where the same would not constitute a burden on commerce, but Congress has not done so. * * *' "

See also *Hoffman v. State of Missouri*, 274 U. S. 21; 71 L. Ed. 905, 47 Sup. Ct. Repr. 285; *D. & R. G. R. Co. et al. v. Terte*, 284 U. S. 284, 76 L. Ed. 295; 52 Sup. Ct. Repr. 152; *Hoch v. Byram et al.*, 230 N. W. 826; *Wood v. D. & H. Ry.*, 63 Fed. (2d) 235; *C. & O. v. Vigor, supra.*

In the *Hoffman* case, *supra*, the cause of action arose at Wichita, Kansas, and suit was brought in Sedalia, Missouri. This Court said:

> "* * * Even a foreign corporation is not immune from the ordinary processes of the courts of a state, where its business is entirely interstate in character. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

Inconvenience, hardship and extra expense have been pointed out clearly not to constitute grounds for the issuance of injunctive relief in many cases akin to the instant case. See *D. & R. G. R. Co. et al. v. Terte, supra; Hoffman v. State of Missouri, supra; C. & O. v. Vigor, supra; So. Ry. v. Cochran, supra; Connelly v. Central R. R. Co. of N. J., supra; Trapp v. B. & O. supra; Wood v. D. & H. Ry. Co., supra, Lancaster v. Dunn*, 95 So. 385; *C. M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N. W. 218; *So. Pac. v. Baum*, 38 Pac. (2d) 1106; *C. M. & St. P. Ry. Co. v. Schendel, supra.* In the *Terte* case, *supra*, this Court said:

> "Further as a practical matter courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses, or refuse jurisdiction according to the relative inconvenience of the parties."

It is perhaps not inappropriate to point out also that the new Federal Rules for the District Courts have eliminated most elements of potential surprise and afford an opportunity to narrow the issues and for each side to be

apprized fully of the nature of the proof to be offered by the other side. Nor has this opportunity gone entirely unavailed of in the instant case.

III.

THE CASES CITED BY THE PETITIONER IN SUPPORT OF ITS CONTENTIONS ARE CLEARLY DIFFERENTIATED FROM OR INAPPLICABLE TO THE INSTANT CASE.

Of the reported decisions in which injunctive relief was allowed, only one (*B. & O. v. Boles, supra*) was an instance where the employee had filed his action in a federal court. The *Boles* opinion by an inferior District Court on a motion for a temporary injunction, in an ex parte hearing, has been discussed on page 3 of this brief. Every other such case cited by petitioner is not in point, for in each the suit by the employee was in a state court and not in a federal court. Into this category fall the Indiana cases cited by petitioner, all of which are differentiated from the instant case by the Supreme Court of Indiana in *McConnell v. Thomson, supra.*

In *Chicago, M. & St. P. Ry. Co. v. McGinley, supra,* the suit of the employee was in a state court but the injunction sought was denied. *Davis v. Farmers' Cooperative Co.,* 262 U. S. 312 was not a Federal Employers' Liability Act case. It involved an action filed in a state court under color of a state statute in a state where the company did not own or operate any railroad, but only maintained an agent for the solicitation of traffic. The *Davis* case has been readily differentiated by this Court from situations more nearly akin to the instant case in *State of Missouri, etc. v. Taylor, supra; Hoffman v. State of Missouri, etc., supra; D. & R. G. R. Co. v. Terte, supra* and *International Milling Co. v. The Columbia Trans. Co.,* 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396.

Douglas v. N. Y., N. H. & H. R. Co., supra, was a case in which this Court held that nothing in the Act of Congress

purported to force a duty upon a state court to assume jurisdiction of an action under the Federal Employers' Liability Act as against an otherwise valid excuse. This Court pointed out that

> "it may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty."

But a federal court in a district in which the defendant is doing business is given no discretion with reference to the exercise of its jurisdiction (*Second Employers' Liability Act* cases, *supra*). It is readily apparent that the *Douglas* case lends no support to petitioner's contentions.

In *Michigan Central R. R. Co. v. Mix*, 278 U. S. 492, 73 L. Ed. 470, the suit was brought by the employee in a state court and not in a federal court in a district in which the defendant was doing business. This case falls into the category of the Indiana cases differentiated from the *McConnell* case, *supra*.

Another group of cases cited by petitioner on pages 25 and 26 of its brief concern themselves with matters with reference to which Congress has not undertaken to legislate. Chief Justice White in *S. A. L. Ry. Co. v. Kenney*, 240 U. S. 489, cited by petitioner in this group of cases, points out significantly at page 497:

> "There can be now no question that the Act of Congress, insofar as it deals with the subjects to which it relates, is supreme and exclusive."

Maurer v. Hamilton, 309 U. S. 598 and *Reid v. Colorado*, 187 U. S. 137, are not authority opposed to respondent's position. The Congressional intent in the enactment of Section 6 of the Federal Employers' Liability Act is clear and unequivocal and the statutory purpose would be frustrated and nullified were a state court possessed of the power of life or death over the exercise of the rights therein granted.

Bryant v. Atlantic Coast Line Ry. Co., 92 Fed. (2d) 569, did not involve the question here presented. In that case it was held only that the Federal District Court had no jurisdiction to enjoin an action in the state court of Virginia, so long as that action did not disturb the Federal Court's jurisdiction. The Court pointed out clearly that the remedy of Bryant was to contest the Virginia action and to appeal from any Virginia decision. The Court, in the *Bryant* case, refers to Sec. 379 of Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265, which provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

On page 570, the Court says:

> "That this section covers the situation, literally admits of no debate."

It must be apparent, therefore, that the *Bryant* case did not intend to become and is not to be considered as authority for the proposition urged by plaintiff.

As the opinion in the Ohio Supreme Court in the instant case puts it (R. 43):

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the state court of Virginia to enjoin the plaintiff from prosecuting his action in the federal court, but held that the District Court was right in not issuing a counter injunction against the defendant in prosecuting its injunction suit in Virgina."

Steelman v. All Continent Co., 301 U. S. 278, involved the power of a court of bankruptcy to enjoin the prosecution of a suit in another federal court upon the ground that the suit, if pressed to a decree, would thwart an inquiry into frauds charged against the bankrupts, or make relief against them difficult. The Court pointed to the provisions

of the Judicial Code, and to the Bankruptcy Act itself, enforcing the authority given by the Judicial Code. Such act invests courts of bankruptcy with jurisdiction at law and in equity to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of the act. The Court, referring to these statutes, points out that the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a court of bankruptcy. The situation in the *Steelman* case is entirely different from that in the case at bar and cannot, in any sense, be construed to warrant injunctive relief against the exercise of a substantive right granted by valid legislative act of Congress. To grant such injunctive relief would destroy and impair to all intents and purposes the admitted mandatory jurisdiction of a federal court with similar jurisdiction, which, in point of fact in the *Steelman* case, the Court regarded as so important as to warrant injunctive relief against action by the individual which would interfere with such jurisdiction.

IV.

OTHER CLAIMS OF PETITIONER ARE ERRONEOUS.

In a somewhat frantic effort to find a peg on which to hang its contentious hat, petitioner makes the claim on page 27 of its Brief that Congress did not intend "the district in which the defendant shall be doing business at the time of commencing such action" to mean any district in which the defendant shall be doing business, because the word "any" is not used. Petitioner's wish thinking would pervert the plain meaning of the language of the Act by adding to the clause "the district in which the defendant shall be doing business," a clause substantially like this "and which best suits the convenience of the defendant." Fortunately for railroad employees engaged in interstate commerce the Congress and not the petitioner still makes the laws applicable to them. In the light of the historical back-

ground of the Federal Employers' Liability Act and of Section 6 particularly it is difficult indeed to take seriously the petitioner's contention in this respect. All of the authorities are unanimous in deeming jurisdiction proper and mandatory in any district in which the defendant shall be doing business. See *C. & O. v. Vigor, supra*, where the Court approves an employee's right to institute his action "in any district" (Syllabus, 4th Paragraph). And see *C. M. & St. P. v. Schendel, supra*, where the Court speaks of the "bald fact that the right existed * * * to bring the case * * * *in any district* where appellant was doing business." See also *Moore v. C. & O., supra*. The emptiness of this frivolous contention is but a fair reflection of the paucity of substance in the petitioner's case.

Petitioner's argument that no distinction ought to be drawn between an action brought in a state court and one brought in a federal court is bottomed on the erroneous notion that Article IV, Section 2 of the Constitution of the United States alone governs an employee's right to sue in a state court and that to enjoin such an action is to violate Article IV, Section 2. Article IV, Section 2 requires only that a state confer on the citizens of the several states all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances (*Cole v. Cunningham*, 133 U. S. 113); that is, one state, when, for instance, establishing regulations for the conduct of private business of a particular kind, can not give its own citizens essential privileges connected with that business which it denies to citizens of other states (*Blake v. McClung*, 172 U. S. 252). Article IV, Section 2 clearly does not profess to control the power of the state governments over the rights of its own citizens (*Slaughter House Cases*, 16 Wall. 77; *Detroit v. Osborne*, 135 U. S. 492; *McKane v. Darston*, 153 U. S. 687). Thus if a state court undertakes to enjoin one of its own citizens it cannot be said to be violating the privileges and immunities clause of the United States Constitution. The right to bring an action in

a state court, applicable alike to the citizens of the several states, springs from the constitutional and statutory provisions of the state which establishes the Court and defines its powers (*Roberts Federal Liabilities of Carriers*, 2nd Edition, Vol. 2, p. 1856).

CONCLUSION.

In *C. M. & St. P. R. Co. v. Schendel, supra*, at page 239, the Court says:

> "It is difficult to take seriously, in this day of our national history, the proposition that a state can be permitted so to destroy the power of a federal court to carry on the work given to it under the acts of Congress. If witnesses, by order of a state court, can be prevented from testifying in a federal court, then the federal court is a mere shell to be crushed by the pressure of the state court injunction. *If a state can compel a citizen to give up one federal right as a prerequisite to bringing suit in a federal court, it can compel him to give up all federal rights. It is a proposition fraught with amazing consequences.*" (Italics ours.)

Were the petitioner's contentions to be allowed we should have a situation so chaotic as to tear down and nullify the structure of the Federal Employers' Liability Act so clearly intended to be constructed in the interest of the employee. Uncertainty and disadvantage would replace definiteness and benefit to the employee inherent in any authorized jurisdiction. That which the Congress intended to be a substantive right reposed in the emplo would be distorted into a boomerang which would strip him of any worthwhile power to exercise the right intended to be granted to him, and render him instead subject to the convenience of the employer and the fancies and predilections, perhaps, of varying concepts of different courts of equity. In each instance in which the employee, under such circumstances, undertook to sue his employer in a court not to the employer's liking, the employee would face the dreary prospect of two suits with all the attendant expense

and delay incidental thereto. Instead of a prompt disposition of the claims of the employee or his dependents in case of his death, there would be delay and almost insurmountable obstacles. Delay operates to the advantage of the defendant. The net result would be to mutilate Section 6, distort the purpose of the Act and deprive a citizen of the United States of a privilege specially intended for him and vest it indeed in the very defendant company against whom the privilege was intended to be lodged.

The contentions urged by the petitioner are patently unsound. Congressional power over interstate commerce is exclusive and plenary. No state court can destroy the valid exercise of this legislative power. The very statement of the petitioner's claim rebels against its acceptance.

The instant suit already has operated for almost a year to delay the trial of the respondent's action on its merits. In this delay is found the true purpose of the instant suit. The harassment, annoyance and vexation in this case have been on the foot of the petitioner and it has kicked persistently and viciously in its effort to protract the litigation and delay that day of reckoning when it must account to the respondent in a court of law for the injuries occasioned him through petitioner's culpable negligence.

Most earnestly do we beseech this Court speedily to deny the instant petition. The disposition of respondent's claim on its merits has been too long delayed. Exercise of the right which Congress vested in the respondent has been frustrated. Such frustration ought not longer to be countenanced. The petition for certiorari should be denied.

Respectfully submitted,

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